

HUMAN SERVICES BOARD

INTRODUCTION

2. The Choices for Care (CFC) Home- Based Service Plan for June 6, 2009-June 5, 2010

3. The CFC Personal Care Worksheet
4. November 28, 2007 Notice of Decision
5. July 25, 2008 Notice of Decision
6. April 14, 2009 Notice of Decision
7. July 13, 2009 Statement of Need submitted by petitioner
8. July 14, 2009 Statement of Cost for Personal Care Services submitted by Petitioner
9. July 24, 2009 Notice of Decision
10. LTC Medicaid Income Eligibility Worksheet

An evidentiary hearing was held on January 26, 2010.

The record was kept open until March 8, 2010 for briefing of the legal issues. Testimony was taken from:

1. N. M., nurse practitioner who provides petitioner's medical care
2. J. M-S., petitioner's daughter
3. J. P., Department Benefit Program Administrator
4. S. L., LTCCC
5. M. T-W., DAIL Long-term Care Medicaid Supervisor

The following decision is based upon the Stipulations of the parties, the evidence adduced at hearing, and briefing of the parties.

FINDINGS OF FACT

1. The petitioner is an eighty-two-year-old woman who suffers from a number of health problems including arteriosclerotic heart disease, hypotension, arthritis, osteoporosis, hemi paresis, dysphagia, constipation, cognitive decline, unsteady gait, and depression. She uses a four-prong cane to walk short distances and a wheelchair otherwise.

2. The petitioner lives in the home of her daughter, J. M-S. Petitioner moved in with her daughter approximately three years ago. J. M-S. is a registered nurse who is using leave to care for her mother.

3. The petitioner's health problems and conditions significantly affect her functional capacity. The petitioner depends on others for assistance with her personal care.

4. On or about June 6, 2007, the petitioner became eligible for Long-term Medicaid including Choices for Care (CFC) services. The CFC program covers payment for personal care attendants.

5. On or about November 28, 2007, the Department sent petitioner a Notice of Decision that her patient share was zero. The Department determined petitioner's patient share

after deducting \$1,430.52 for uncovered medical expenses from petitioner's income. The uncovered medical expenses included personal care received by petitioner in excess of the services covered by the CFC program.

6. On or about July 25, 2008, the Department sent petitioner a Notice of Decision that her patient share was zero. The Department deducted \$1,451.04 in uncovered medical expenses including personal care from petitioner's income.

7. On or about April 14, 2009, the Department sent petitioner a Notice of Decision that her patient share was \$45 after deducting \$1,451.04 in uncovered medical expenses including \$1,098.49 for personal care. The personal care figure was derived from the Statement of Need and Statement of Cost for Personal Care Services (Forms 288B and 288C) submitted by the petitioner.

8. In terms of personal care services, petitioner needs daily help. She needs full assistance with meal preparation and with her Instrumental Activities of Daily Living (IADLs). She needs extensive assistance with her Activities of Daily Living (ADLs) of dressing, personal hygiene, transferring, toileting, bathing, and bed mobility. She needs limited assistance with medication management and her ADLs of mobility and eating.

9. DAIL periodically certifies the petitioner for CFC services. The current CFC service year covers June 10, 2009 to June 5, 2010. She receives 23.75 hours of in-home personal care services five days per week. Petitioner's CFC hours are divided between 18.25 hours for ADLs and 5.5 hours for IADLs. Petitioner also receives 720 hours per year for respite care and 48 hours per year for case management. Petitioner receives payment for Lifeline.

10. Petitioner receives personal care services from her daughter including the two days per week not covered by the CFC program.

11. On or about July 13, 2009, petitioner submitted a Form 288B setting out her statement of need. Form 288B was signed by N.M., an advance practice registered nurse. N.M. listed the following conditions: depression, bladder incontinence, constipation requiring digital disimpaction frequently, memory deficit/confusion, hyperlipidemia, left sided paralysis, fall risk, arthritis, cardiovascular disease, and s/p stroke with hemi paresis. She stated that petitioner would need assistance indefinitely with personal hygiene, dressing, walking, toileting, transferring,

standing, eating, managing medications, managing money and other (socialization/intellectual stimulation, fall risk).

On or about July 14, 2009, petitioner submitted a Form 288C setting out the costs for personal care services provided by her daughter. Petitioner's daughter set out a cost of \$2,400 per month including room and board and help with personal care not covered by the Visiting Nurse Association through the CFC program. Petitioner requested personal care expenses based upon 676.2 hours per month including 60-80 hours for general supervision.

12. On or about July 24, 2009, the Department sent petitioner a Notice of Decision that her patient share would be \$1,155.09 starting September 1, 2009. The notice incorporated information from the LTCCC regarding personal care expenses. The Department did not allow petitioner a deduction for personal care expenses as part of uncovered medical expenses. The Department's reason stated that "because your request for personal care services has been denied by DAIL based on the decision that general supervision is not medically necessary." The petitioner appealed from this notice.

13. Petitioner's condition and her functional abilities have not improved since her eligibility for long-term Medicaid started.

14. The change in petitioner's case stems, in part, from the Department changing who determines personal care expenses when calculating patient share.

15. According to J.P., the Department uses the LTCCCs to determine personal care expenses for those recipients receiving CFC services. The Department started this process in mid 2009.

In terms of recipients receiving community Medicaid, the Department continues to use their benefit program specialists to determine personal care expenses. If the Department has questions because the claimed amount for personal care seems high or unusual, the Department can ask the medical staff at the Office of Vermont Health Access (OVHA) for assistance.

16. S.L. did not handle petitioner's case. She did a paper review prior to her testimony. Her paper review included the petitioner's request for personal care hours of 20.3 hours per day and the determinations of the LTCCC who worked on petitioner's case. S.L. concurred with the decision. According to S.L., their concern is duplication of services. S.L. believed that petitioner was requesting

personal care services only for general supervision. The CFC program does not cover general supervision.

17. The Department's witnesses believe that the Department erred in the past by allowing personal care expenses in excess of medical need.

18. N.M. has been a nurse practitioner since 1986. She is an advanced practice RN. She is petitioner's primary care provider. Her testimony is generally in accord with the evidence setting out the areas in which petitioner needs assistance with ADLs and IADLs.

N.M. adds that petitioner's stroke and depression affect her cognition leading to cloudy thinking and periods of forgetfulness. N.M. does not believe that petitioner should be left alone for a period of time due to mobility issues. She finds that the CFC hours are complemented by the family and that petitioner needs more personal care hours than provided through the CFC program. She did not state how many more personal care hours petitioner needs.

19. J. M-S. described a typical day for petitioner. J. M-S. helps petitioner awaken and get out of bed. They do stretching exercises and range of motion exercises. Petitioner has an atrophied left leg and her exercises help her do weight bearing on her leg. Their first stop is the

bathroom. Petitioner is usually incontinent in the morning. J. M-S. helps petitioner with toileting, skin care, mouth care, and dressing.

Petitioner eats breakfast. She needs to be prompted to take her medications. According to J. M-S., petitioner then uses the bathroom, ambulates around the house with assistance and then naps for 1.5 to 2 hours. After petitioner awakens, she uses the bathroom with assistance and then has lunch. The day continues with dinner, family time, bathroom use and then bedtime. J. M-S. believes the petitioner needs personal care services 24 hours per day.

20. Petitioner needs personal care services daily. The CFC program only provides services five days per week. Using the CFC calculations, she needs 9.5 hours per week to cover the times CFC services are not provided.

ORDER

The Department's decision is reversed and remanded to include personal care expenses for the two days per week not currently covered through the CFC program.

REASONS

The Department requires recipients of Long-term Care Medicaid to apply their available income to the cost of their

care. W.A.M. § 4400. The specific requirements for patient share are found in W.A.M. §§ 4460-4462.5 and 4450-4452.

W.A.M. § 4460 states, in part:

Once the department determines individuals are eligible for long-term care, including waiver and hospice services, it computes how much of their income must be paid to the long-term care provider each month for the cost of care (patient share)...The department determines the patient share amount at initial eligibility, eligibility redeterminations, and when changes in circumstances occur.

An individual's patient share is determined by computing the maximum patient share and deducting allowable expenses.

W.A.M. § 4462 lists allowable deductions to determine patient share and refers back to W.A.M. 4440-4453 regarding allowable medical expenses. W.A.M. § 4452C allows a deduction for personal care expenses provided the expenses are for "necessary medical and remedial expenses".

The specific requirements for personal care services are set out in W.A.M. § 4452.3 which states, in part:

The department will allow a deduction for noncovered personal care services...when they are medically necessary in relation to an individuals medical condition.

A. Deductible Personal Care Services

Deductible personal care services include those personal care services described in rule 7406.2 and assistance with managing money. They also include general supervision of physical and mental well-being where a physician states such care is required due to a specific diagnosis, such as

Alzheimers disease or dementia or like debilitating diseases or injuries. Room and board is not a personal care service.

. . .

C. Documentation

To document the need for personal care services, the physician must submit:

1. a plan of care (form 288B);
2. a list of the personal care services required;
3. a statement that the services are necessary in relation to a particular medical condition;. . .

The covered services in W.A.M. § 7406.2 include:

Assistance with bathing, dressing and grooming;

Assistance with bladder or bowel requirements;

Assistance with medications which are ordinarily self-administered;

Assistance with eating, drinking and diet activities, to include the preparation of meals when necessary;

Assistance in monitoring vital signs;

Routine skin care;

Assistance with positioning, lifting, transferring, ambulation, and exercise;

Assistance in use of adaptive equipment;

Limited housekeeping services essential to a recipient's comfort and health and incidental to the medical care of the recipient;

Accompanying the recipient to clinics, physician office visits, or other trips which are medically necessary;

Continuation of training programs to increase or maintain recipient independence, physical and/or cognitive and emotional well-being, and to promote health and safety.

The covered services above incorporate the ADLs and IADLs of the CFC program but are broader in scope.

Here, the Department is reducing the deduction for personal care. The major change in the past year is the use of the LTCCCs to determine the personal care component of the patient share.

The Department alludes to mistakes in the past regarding the calculation of personal care expenses because their benefit program specialists are not medically trained; using the LTCCCs is a way to correct the calculations. However, the Department continues to treat community based Medicaid recipients in the same manner as they did in the past by allowing the benefit program specialists to determine personal care expenses except where the amount claimed or

information raises a question. Then, a medical opinion is sought from OVHA.¹

Specifically, the Department alludes to mistakes in the calculations of past personal care expenses in the petitioner's case. The Department's witnesses address this by referring to general supervision although the evidence does not support their testimony that past or present requests are for general supervision only. The problem is that the 288B and 288C provided by petitioner raise questions regarding petitioner's personal care deduction.

N.M. submitted the 288B (plan of care) on behalf of petitioner. She lists a number of ADLs and IADLs. N.M. also lists socialization and intellectual stimulation. N.M. does not give an indication of the time needed for personal care in the 288B. In terms of her testimony, she indicates that petitioner needs time in addition to the CFC allocation but does not give a figure.

The 288C is more problematic. J. M-S. indicates that the petitioner needs personal care in the amount of 676.2

¹The Department is creating a system that does not provide equal reviews to all recipients. To the extent that review of personal care expenses involves review of the medical plan of care, the better solution is to use a medical model for all reviews.

hours per month of which 40-60 hours are supervision. The total is equivalent to 157 hours per week or over 22 hours per day. This is in addition to the CFC services. On its face, the amount claimed is nonsensical. The evidence in the record does not support this request.

However, the evidence supports a personal care expense for the two days in which CFC services are not provided (9.5 hours per week or 40.85 hours per month). These services are necessary and should be covered. Petitioner may be eligible for additional services but the record does not provide adequate information for a determination.

It is not necessary to reach the other issues raised by the parties. Petitioner is receiving continuing benefits through this appeal and can initiate a review taking into account this decision. The Board expects that future 288Bs and 288Cs will provide more specific information connecting medical need to specific personal care services including times required and that future reviews will look to those personal care services not covered by CFC or other services as well as consider that the regulation allows general supervision for a broader range of ailments than argued by the Department.

The Department's decision is reversed and the Department should include in its calculation for patient share a personal care allowance based on 40.85 hours of service per month. The parties should initiate a new review or redetermination of petitioner's benefits. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

#